IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 537

GLENSHAW GLASS COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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MAY IT PLEASE THE COURT:

I.

The petition for certiorari demonstrates that the Administrative Procedure Act governs the judicial review of Tax Court decisions and enlarges the scope of that review. These are important questions of federal law that have not been but should be decided by this Court.

Without joining issue on these questions or denying their importance, the respondent seeks to avoid the granting of the writ by the assertion that since the decision below must be affirmed under any theory of judicial review these ques-

tions are not presented. This argument misses the mark for several reasons.[1]

In the first place, we do not believe that the review by this Court of important legal questions rests upon an *a priori* decision as to whether affirmance or reversal will result in the particular case. Here, such a practice would only serve indefinitely to postpone decision, encourage litigation and impede the proper administration of the revenue laws in the courts below.

In the second place, assuming for the moment that respondent's view of the evidence is the correct one, the assigned questions are nonetheless presented for decision. For example, the requirement of the Administrative Procedure Act that the agency action must be supported by substantial evidence upon a review of the whole record probably makes the scope of review somewhat less than a weighing of the evidence *de novo* and somewhat more than an examination of only the evidence in support of the agency action. The preliminary determination called for by the respondent that the decision below must be affirmed even if the Administrative Procedure Act applies, inevitably requires a drawing of the line between those two extremes, and, hence, a decision as to the nature of the

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[1] In a footnote, respondent does seem to suggest that the scope of judicial review has not been enlarged by the Administrative Procedure Act. (Resp. Br. 10, fn. 4). The legislative history and decisions to the contrary have been set out in the petition. (Pet. 14-20). It should be noted that not only does the respondent ignore the Administrative Procedure Act requirement that the findings be supported by substantial evidence *upon a review of the "whole record"*, but that the legislative history relied upon does not support the respondent's position. The statements by Senator McCarran seem to justify quite a different conclusion. And the extension of remarks by Representative Hobbs consists of a portion of an anonymous Department of Justice memorandum. As this Court knows, extensions of remarks are not made upon the floor of the House, and this particular extension of remarks seems to be merely a clumsy "plant" of purported legislative history.

judicial review under that Act. Decisions of that importance should not be made in silence. Seductive assumptions that a particular decision must be affirmed upon any theory of judicial review serve simply to conceal a lack of analysis and a refusal to come to grips with and decide the actual problems presented. Responsible disposition of this, as well as other Tax Court decisions, can be obtained only when the applicable standards of judicial review are clearly known and the particular decision is tested against those standards.

And finally, the respondent's view that affirmance is inevitable is simply not supported by the record facts. The Tax Court found that the amounts paid in 1942 in excess of $67,000 were a distribution of earnings and not compensation. This ground for decision was selected by the Tax Court to the exclusion of any other. If the judicial eye is to be confined by *Scottish-American* blinders,[2] to an examination of only that evidence which may be said to support the findings made by the Tax Court, we do not say that affirmance might not result. But if the Administrative Procedure Act applies and if the judicial eye is free to examine the entire record, then we say that the Tax Court's findings and decision can not stand. The petition for certiorari summarizes the overwhelming evidence which deprives the findings of any substantial basis. (Pet. 19). Moreover, respondent wholly abandons the defense of the only ground selected by the Tax Court for its decision and asserts that the "basic and only issue" was the reasonableness of the payments as compensation. (Resp. Br. 10-11). This case peculiarly presents for exploration and decision the meaning of the "review of the whole record" requirement of the Administrative Procedure Act.

The start must be made somewhere. It may be assumed that respondent will always assert that Tax Court findings

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[2] *Scottish-American Investment Co., Ltd.*, v. *Commissioner*, 323 U. S. 119, 124 (1944).

in his favor must be sustained under any theory of judicial review. What is important is that an authoritative determination be had as to whether the Administrative Procedure Act has enlarged the area over which the judicial eye may rove, or whether the Act is simply declaratory of preexisting law. Once those fundamental principles have been settled by this Court, the Circuit Courts of Appeals can proceed with a case by case application of the standards of the Act. The urgency of an early statement by this Court cannot be overstressed.

II.

To the extent that the decision of the Circuit Court of Appeals affirmed the judgment of the Tax Court upon the ground that the disallowed amounts constituted unreasonable compensation, that decision is in conflict with the *Chenery* cases.[3]

The Tax Court did not decide the question of whether the increases in the amounts paid in 1942 were reasonable as compensation. The petition clearly shows that the sole ground for the Tax Court's decision was its conclusion that the 1942 increases represented, not compensation, but a distribution of dividends. (Pet. 20-24). Having decided this, there was no occasion for the Tax Court to decide, and it did not decide, whether the disallowed amounts would have been reasonable as compensation.[4]

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[3] *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 94-5 (1943); *id.* 332 U. S. 194, 196-7 (1947).

[4] The closest approach to a decision of that issue is the statement that nothing occurred in petitioner's business during 1942 that would warrant a substantial increase in the salaries paid. (R. 163). This is not and can not be interpreted as a finding that if the disallowed amounts were compensation they would have been unreasonable since it ignores the possibility that the compensation paid in 1941 and allowed in its entirety by the Tax Court was not the maximum that could reasonably have been paid.

Respondent would substitute what he terms the "plain tenor" of the findings and opinion for this deficiency and place the decision of the Tax Court upon a basis wholly different from that expressly selected by it. The so-called "plain tenor" is no substitute for missing essential findings.[5]

It is plainly improper for the reviewing court to supply missing essential findings, to make precise what the Tax Court left vague or to substitute an alternative ground for that selected as the basis of decision by the Tax Court itself. To do so is for the reviewing court to propel itself into the fact-finding arena where it does not belong. And in view of the great weight given to the findings and decisions of the Tax Court, it is imperative that those findings be stated with precision. Otherwise the reviewing courts might give controlling weight to findings or a decision not

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[5] Certain misstatements in respondent's brief require correction. Contrary to the assertion in footnote 5 (pp. 10-11), the petitioner has never stated that the Tax Court did not find that $67,000 was reasonable for 1942. Petitioner merely asserts that the Tax Court did not find that any compensation in excess of $67,000 would have been unreasonable. Such a finding was unnecessary since, in the Tax Court's view, the amounts paid in excess of $67,000 were not compensation but a distribution of earnings.

Respondent's attempt to draw some prejudicial inference from the taxpayer's acquiescence in the Commissioner's computation of the 1942 deficiency based upon the Tax Court's allowance of $67,000, rests either on ignorance or lack of candor. (Resp. Br. 11, fn. 5). As Rule 50 of the Tax Court's Rules of Practice and Procedure makes clear, the petitioner's acquiescence is confined solely to the mathematical accuracy of the computation and is without prejudice to petitioner's right to contest the basis of the Tax Court's decision.

At page 9 respondent asserts that "Under the circumstances, the Tax Court was fully justified in concluding that taxpayer failed to meet its burden of proving that the amount of $127,479.85 it deducted for 1942 represented reasonable compensation." No such conclusion was reached by the Tax Court. It concluded that $67,000 was reasonable as compensation and that the taxpayer had not met its burden of proving that the balance did not constitute a distribution of earnings. (R. 161, 164).

in fact the product of the Tax Court's special competence. These considerations call for the strict application to the Tax Court of the principles of the *Chenery* cases.

CONCLUSION

For the reasons heretofore given, a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be allowed.

Respectfully submitted.

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